UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDREW ARNOLD, Plaintiff, -v- 1199 SEIU, Defendant.	09 Civ. 5576 (DLC) OPINION & ORDER

Appearances:

For Plaintiff Pro Se:
Andrew Arnold
1964 Nereid Avenue
Bronx, NY 10466

For Defendant:
Richard Dorn
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80 Eighth Avenue Floor 8
New York, NY 10011-5126

DENISE COTE, District Judge:

Pro se plaintiff Andrew Arnold brings this lawsuit against defendant 1199 SEIU (the "Union") for alleged breach of its duty of fair representation in connection with plaintiff's discharge from employment at Beth Abraham Health Services ("Beth Abraham"). On June 29, 2009, the Union filed this motion to dismiss and motion for summary judgment. For the following reasons, both of the Union's motions are granted.

BACKGROUND

The uncontested facts below are taken from the parties' Local Rule 56.1 Statements of Material Facts Not in Dispute as supported by the adjoining declarations and exhibits.[1] Certain additional facts alleged by plaintiff in his March 26, 2009 complaint are assumed to be true only for the purposes of resolving the motion to dismiss.

The plaintiff, Andrew Arnold, was a full-time employee of Beth Abraham working as an "Authorization Specialist" until he was fired on April 5, 2007. While working at Beth Abraham, plaintiff was a member of the Union. The terms of employment for Union members working at Beth Abraham were governed by a collective bargaining agreement ("CBA") concluded between the Union and the League of Voluntary Hospitals and Homes of New York, an agent acting on behalf of Beth Abraham. The terms of the CBA included, inter alia, that neither Beth Abraham nor the

[1] In serving the plaintiff with its motion for summary judgment, the defendant included a "Notice to Pro Se Litigant Who Opposes a Motion for Summary Judgment" as required by law in this Circuit. See Hernandez v. Coffey, 582 F.3d 303, 308 (2d Cir. 2009). The plaintiff thereafter submitted his own Local 56.1 Statement. Within that statement, the plaintiff also included a section styled as "Statement of Additional Disputed Facts" (the "Additional Statement"). The Additional Statement includes a list of allegations that plaintiff believes are issues of disputed material fact requiring trial. These disputed facts concern, in large part, the knowledge that the Union possessed concerning plaintiff's employment relationship with Beth Abraham. Because none of the facts included in the Additional Statement materially affect the legal analysis as set forth below, however, they are not described in detail herein.

Union could "discriminate[] against" any covered Union employee. The complaint alleges that plaintiff was discriminated against by Beth Abraham during his employment in violation of the CBA. Specifically, plaintiff alleges that Beth Abraham assigned him a "disproportionately greater workload than workers of coordinate jurisdiction of a different gender."

After the plaintiff was fired, the Union grieved plaintiff's discharge from employment. A "step III grievance conference" was held in May 2007, at which plaintiff, three Union representatives, and four Beth Abraham administrators were present (the "step III conference").[2] Following the conference, Beth Abraham upheld its decision to fire plaintiff and denied the grievance by memorandum of May 24, 2007. The basis for this decision, as set out in the memorandum, was that plaintiff had exhibited "[s]ubstandard work performance" and had "failed to improve [his] work performance" since a previous step III hearing held on September 13, 2006.

Thereafter, by letter of May 30, 2007, a representative of the Union, Elise Laviscount, notified plaintiff that it had conducted "a thorough investigation of [his] grievance" and

[2] The complaint alleges that the grievance conference was held on May 24, 2007, while the memorandum of decision dated May 24 states that the grievance conference was held on May 14. The question of whether the Union "defended [plaintiff] appropriately" at the step III conference is disputed between the parties.

"concluded that it does not warrant arbitration." The letter noted, however, that plaintiff had the right "to make further appeal through the Chapter Hearing and Appeal Board" by submitting a request for appeal in writing within 48 hours of plaintiff's receipt of the Union's letter. The Chapter Hearing and Appeals Board had the authority to direct the Union to take plaintiff's case to arbitration.[3] The letter went on to state that "your failure to respond within the specified time will leave us no alternative but to believe you are not interested in pursuing the matter and we will, therefore, consider the case closed." Plaintiff did not file a request to appeal the Union's determination. Instead, on July 7, 2007, plaintiff sent a letter to the Union stating that he was "not in a position to revive our now defunct relationship of some 30+ days." On September 4, 2007, the Union sent a letter advising plaintiff that his case was closed because plaintiff had failed to file an appeal of the denial of his grievance.

In the complaint, plaintiff alleges that the Union "fail[ed] to represent [him] fairly" in connection with his grievance hearing. The complaint also alleges that the Union failed to conduct an adequate investigation before deciding not

[3] The plaintiff denies that the Union disclosed in its letter of May 30, 2007, that the Chapter Hearing and Appeals Board had the authority to send the plaintiff's grievance to arbitration. Nevertheless, the plaintiff does not dispute that the Appeals Board had this authority.

to take plaintiff's claims to arbitration; that the Union "breached the contract"; and that, as a result, "1199 SEIU has breached its statutory duty of fair representation by the manner in which it handled [plaintiff's] grievance."

PROCEDURAL HISTORY

Plaintiff filed this action in New York Supreme Court, Bronx County, on or about March 26, 2009. After being served, the Union filed a notice of removal in this Court on June 17 and filed a motion to dismiss and motion for summary judgment on June 29. Plaintiff moved to remand his case to state court on July 1, and the plaintiff's motion was denied by an August 17 Memorandum Opinion and Order. The Union's motion to dismiss and motion for summary judgment became fully submitted on August 27.

DISCUSSION

I. Standards of Decision

The Union has moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and, in the alternative, has moved for summary judgment pursuant to Rule 56. "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937, 1949 (2009). For a plaintiff's claim to survive a motion to dismiss, "a complaint must contain

sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (citation omitted)). Applying this plausibility standard is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 129 S. Ct. at 1950.

A court considering a motion to dismiss pursuant to Rule 12(b)(6) "must accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party." Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 115 (2d Cir. 2008) (citation omitted). Moreover, pleadings filed by pro se plaintiffs are to be construed liberally. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) ("[A] pro se complaint . . . must be held to less stringent standards than formal pleadings drafted by lawyers." (citation omitted)); Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) ("Even after Twombly, . . . we remain obligated to construe a pro se complaint liberally.").

A motion for summary judgment under Rule 56 involves a different standard. Summary judgment may not be granted unless all of the submissions taken together "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(c). The moving party -- here, the Union -- bears the burden of demonstrating the absence of a material factual question; in making this determination, the court must view all facts "in the light most favorable" to the nonmoving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Holcomb v. Iona Coll., 521 F.3d 130, 132 (2d Cir. 2008). Once the moving party has asserted facts showing that the non-movant's claims cannot be sustained, however, the non-moving party must "set out specific facts showing a genuine issue for trial," and cannot "rely merely on allegations or denials" contained in the pleadings. Fed. R. Civ. P. 56(e)(2); Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). That is, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Moreover, only disputes over material facts -- "facts that might affect the outcome of the suit under the governing law" -- will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Roe v. City of Waterbury, 542 F.3d 31, 35 (2d Cir. 2008) (quoting Anderson).

II. Breach of Duty of Fair Representation

A. Applicable Law

Although plaintiff does not refer to a federal statute by name, the complaint does allege a violation of the defendant's "statutory duty of fair representation." The "duty of fair representation is implied from § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a)." White v. White Rose Food, a Div. of DiGiorgio Corp., 237 F.3d 174, 179 n.3 (2d Cir. 2001).[4] Plaintiff's claims also involve interpretation of the CBA between the Union and Beth Abraham, and as such, plaintiff's claims are governed by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. "In order to provide individual employees with recourse when a union breaches its duty of fair representation in a grievance or arbitration proceeding, the Supreme Court has held that an employee may

[4] The Supreme Court further explained in DelCostello v. Int'l Brotherhood of Teamsters:

> The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually . . . . In such a system, . . . it must be the duty of the represent-ative organization to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

462 U.S. 151, 164 n.14 (1983) (citation omitted).

bring suit against both the union and the employer." Carrion v. Enterprise Ass'n, Metal Trades Branch Local Union 638, 227 F.3d 29, 33 (2d Cir. 2000). Such a suit is known as "a hybrid § 301/duty of fair representation claim." Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers, 415 F.3d 279, 282 (2d Cir. 2005); see also DelCostello, 462 U.S. at 164-65 (outlining the two claims and identifying them as "inextricably interdependent"). To prevail on a hybrid Section 301/fair representation claim, the plaintiff "must demonstrate both (1) that [the employer] breached its collective bargaining agreement and (2) that [the union] breached its duty of fair representation." Sanozky, 415 F.3d at 282. In other words, although the plaintiff need not name both the employer and the union as defendants, the plaintiff must prove fault by both in order to succeed against either. Carrion, 227 F.3d at 33; see also DelCostello, 462 U.S. at 165 ("The employee may . . . sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.").

For the purposes of deciding these motions, only the Union's duty of fair representation will be considered. "A union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." Sanozky, 415 F.3d at 282 (quoting Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44

(1998) (alteration omitted)). This duty applies to a union's representation of an employee during the grievance process following an employee's termination. See Wilder v. GL Bus Lines, 258 F.3d 126, 129 (2d Cir. 2001) (noting that "[a] wrongfully discharged employee may sue his . . . union" for failing to pursue the employee's grievance through CBA remedial procedures). Although "a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion," members "do not have an absolute right to have their grievances taken to arbitration." Spellacy v. Airline Pilots Ass'n-Int'l, 156 F.3d 120, 128 (2d Cir. 1998) (citation omitted). "[T]he duty of fair representation is not breached where the union fails to process a meritless grievance," Cruz v. Local Union No. 3 of Int'l. Bhd. of Elec. Workers, 34 F.3d 1148, 1153-54 (2d Cir. 1994), because "a union must be allowed to exercise reasonable discretion as to how it can best satisfy the interests of the individual as well as the interests of the collective unit." Pyzynski v. N.Y. Cent. Ry. Co., 421 F.2d 854, 864 (2d Cir. 1970).

B. Statute of Limitations

The statute of limitations period on a hybrid Section 301/fair representation claim is six months, as established by the Supreme Court in DelCostello v. International Brotherhood of

Teamsters.[5] See DelCostello, 462 U.S. at 165. The six-month period "begins to run when the employee knew or should have known of the breach of the duty of fair representation" -- in other words, the date when an employee discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation. White v. White Rose Food, a Div. of DiGiorgio Corp., 128 F.3d 110, 114 (2d Cir. 1997); see also Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers, 378 F.3d 269, 278 (2d Cir. 2004) ("[I]n a suit alleging a breach of the duty of fair representation brought by union members against their union, the cause of action accrues no later than the time when the union members knew or reasonably should have known that a breach has occurred" (citation omitted)). Moreover, "[o]nce a plaintiff learns of his union's breach of its duty of fair representation, the union's subsequent failure to actually represent the plaintiff[] cannot be treated as a continuing violation that precludes the running of the limitations period." Buttry v. Gen. Signal Corp., 68 F.3d 1488, 1492 (2d Cir. 1995) (citation omitted).

The statute of limitations is an affirmative defense, meaning that the defendant bears the burden of proof. See

[5] The Second Circuit has held that this six-month period applies as well to "unfair representation claims standing alone." Eatz v. DME Unit of Local Union No. 3 of Int'l Bhd. of Elec. Workers, 794 F.2d 29, 33 (2d Cir. 1986).

Overall v. Estate of Klotz, 52 F.3d 398, 403 (2d Cir. 1995). "Where the dates in a complaint show that an action is barred by a statute of limitations, a defendant may raise the affirmative defense in a pre-answer motion to dismiss." Ghartey v. St. John's Queens Hosp., 869 F.2d 160, 162 (2d Cir. 1989). In such a case, the limitations defense is properly raised through a Rule 12(b)(6) motion. Id.; see also McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004) ("An affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6) . . . if the defense appears on the face of the complaint." (citation omitted)). Dismissal is appropriate, however, "only if a complaint clearly shows the claim is out of time," Harris v. City of New York, 186 F.3d 243, 250 (2d Cir. 1999), and thus the plaintiff's "survival of a Rule 12(b)(6) motion to dismiss on statute of limitations grounds requires only allegations consistent with a claim that would not be time-barred." Id. at 251. Construing the complaint liberally, the allegations of the complaint alone do not clearly demonstrate that plaintiff's claim is time-barred. Although the complaint notes that the plaintiff's grievance hearing was held on May 24, 2007, it is not evident on the face of the complaint when the plaintiff knew, or reasonably should have known, of the union's alleged "failure to represent [him] fairly."

Considered within the framework of summary judgment, however, plaintiff's lawsuit against the Union is clearly time-barred.[6] The statute of limitations began to run in early June 2007, when plaintiff received the Union's May 30, 2007 letter informing him that it would not pursue his grievance to arbitration. Approximately twenty-one months elapsed between the date that the plaintiff received the Union's letter and the date that plaintiff filed suit in New York Supreme Court, and as such, the six-month statute of limitations under DelCostello operates to bar plaintiff's claim. See Carrion, 227 F.3d at 32.

Plaintiff argues in opposition that "he did not attain 'constructive knowledge'" of the Union's breach of its duty of fair representation until he received the Decision and Order of December 16, 2008, issued by Hon. Geoffrey Wright of the New York Supreme Court.[7] Plaintiff's argument is without merit. It is the plaintiff's knowledge of the Union's allegedly violative conduct, not the plaintiff's knowledge of his own legal rights and remedies, that determines when the statute of limitations

[6] Because the complaint fails on this ground, it is unnecessary to reach defendant's claims that the plaintiff failed to exhaust his union or administrative remedies with respect to his hybrid § 301/fair representation claim.

[7] Plaintiff does not explain why or how Justice Wright's Decision and Order gave rise to his "constructive knowledge." The Decision and Order itself, attached as an exhibit to plaintiff's opposition papers, makes no reference to plaintiff's potential claims for relief under the LMRA.

begins to run. See, e.g., Cohen v. Flushing Hosp. & Med. Ctr., 68 F.3d 64, 68 (2d Cir. 1995) ("A breach of duty by the union is apparent to the member at the time she learns of the union action or inaction about which she complains." (citation omitted)). Here, it is undisputed that plaintiff learned of the Union's failure to represent him adequately no later than June 2007, when plaintiff received the letter from Ms. Laviscount informing him that the Union would not contest the denial of his grievance by taking his case to arbitration. This knowledge was more than sufficient to trigger the limitations period. See, e.g., id. (noting that the plaintiff's knowledge that the union "had done nothing . . . to pursue his grievance" against the employer as of a certain date was "sufficient to start the statute of limitations running"). Indeed, the July 7 letter that plaintiff sent to the Union declaring that his relationship with the Union was "defunct" makes clear that the plaintiff was aware, as of that date, that the Union had failed to adequately represent him. See Williams v. N.Y. City Hous. Auth., 458 F.3d 67, 70 (2d Cir. 2006) (noting, based on a letter written by plaintiff to the union "voicing her dissatisfaction," that plaintiff had been on notice of the union's alleged breach of the duty of fair representation).

The statute of limitations is not a jurisdictional bar, and as such, a court may toll the limitations period under

exceptional circumstances. To the extent that plaintiff now seeks to argue that he is entitled to a toll, however, plaintiff has failed to allege facts sufficient to support a finding of extraordinary circumstances, such as facts showing that the Union prevented him from filing a timely claim or misled him regarding its intention not to proceed to arbitration. See Valdez ex rel. Donely v. United States, 518 F.3d 173, 182 (2d Cir. 2008) (noting that a statute of limitations may be tolled based on "equitable tolling, fraudulent concealment of a cause of action, and equitable estoppel"); Cohen, 68 F.3d at 69 (discussing when a statute of limitations may be tolled for "[f]raudulent concealment . . . predicated on a union deliberately misleading the plaintiff about a breach" of its duty of fair representation). The plaintiff's ignorance of his own legal remedies, without more, is an insufficient basis for equitably tolling the statute of limitations.

III. Breach of Contract

In his opposition declaration, plaintiff refers to his complaint as "seeking relief for . . . breach of contract." This cause of action, deriving from New York state law, is not set out explicitly in either the complaint or in the opposition brief.

Even if the complaint were construed liberally to allege a claim for breach of contract, however, any such claim must necessarily fail because it is preempted by Section 301 of the LMRA. "[A]ny state-law cause of action for violation of collective-bargaining agreements is entirely displaced by federal law under § 301," meaning that "only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective-bargaining agreements." United Steelworkers of Am., AFL-CIO-CLC v. Rawson, 495 U.S. 362, 368 (1990). Whether a state-law claim is preempted requires deciding whether it "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985); see also Wynn v. AC Rochester, 273 F.3d 153, 157 (2d Cir. 2001) ("Where the resolution of a state-law claim depends on an interpretation of the collective-bargaining agreement, the claim is pre-empted." (citation omitted)). Because the complaint could only reasonably be construed to allege that the Union violated the CBA, and not any other contract, plaintiff's separate state-law claim for breach of contract is preempted and must be dismissed.[8]

[8] Plaintiff's complaint does not make reference to the 1199 SEIU Union Constitution. To the extent that the plaintiff sought to rely upon breach of the Union Constitution as the basis for his breach of contract claim, however, such a claim would also be

IV. Tortious Interference with Contract

Finally, in his opposition brief, plaintiff also maintains that the complaint states a state-law claim for tortious interference with contract. Under New York law, "[t]o establish tortious interference, a plaintiff must show (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages." White Plains Coat & Apron Co., Inc. v. Cintas Corp., 460 F.3d 281, 285 (2d Cir. 2006) (citation omitted).

Plaintiff's claim is without merit and must be dismissed. A claim for tortious interference with the CBA cannot lie against the Union because the Union is itself a party to the CBA. See Albert v. Loksen, 239 F.3d 256, 274 (2d Cir. 2001) ("The tort of interference with an employment contract cannot lie against the [defendant] because it is a party to the alleged employment contract" (citation omitted)). Because no one aside from the Union is named as a defendant in this action, plaintiff's tortious interference claim must necessarily fail.

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preempted by the LMRA. See Wall v. Constr. & Gen. Laborers' Union, Local 230, 224 F.3d 168, 178 (2d Cir. 2000) (stating that "Section 301 of the LMRA preempts claims that are inextricably intertwined with consideration of the terms of a labor contract" and noting that "for preemption purposes, the term 'labor contract' includes union constitutions." (citation omitted)).

In any event, any claim for tortious interference with the CBA would also be preempted by Section 301. Preemption under Section 301 extends not only to contract claims, but also to suits alleging liability in tort. See Allis-Chalmers, 471 U.S. at 210-11 (holding that an employee's tort lawsuit against an employer arising out of a collective bargaining agreement was preempted by the LMRA); Elec. Workers v. Hechler, 481 U.S. 851, 862 (1987) (extending Allis-Chalmers to preempt a tort suit by an employee against her union); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405-06 (1988) ("[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted . . . ."); Anderson v. Aset Corp., 416 F.3d 170, 171-72 (2d Cir. 2005) (per curiam) (holding that a plaintiff's claim against a third party for tortious interference with plaintiff's collective bargaining agreement with plaintiff's employer was preempted by Section 301).

CONCLUSION

The Union's June 29 motion to dismiss is granted as to plaintiff's claims for breach of contract and tortious interference with contract, and the Union's June 29 motion for summary judgment is granted as to plaintiff's hybrid Section

301/fair representation claim on the basis that the claim is time-barred. The Clerk of Court shall close the case.

SO ORDERED:

Dated: New York, New York
December 15, 2009

DENISE COTE
United States District Judge

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